

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 19, 2009 Session

**KEVIN C. REDMAN v. JAMES NEELEY, COMMISSIONER,
TENNESSEE DEPARTMENT OF LABOR AND WORKFORCE
DEVELOPMENT, ET AL.**

**Appeal from the Chancery Court for Dickson County
No. 9135-04 Robert E. Burch, Judge**

No. M2008-00914-COA-R3-CV - Filed March 30, 2009

The claimant appeals the trial court's order affirming the denial of his request for unemployment benefits by the Tennessee Department of Labor and Workforce Development. We agree with the trial court that there is substantial and material evidence in the record to support the agency's finding that claimant's attendance problems constitute workplace misconduct under Tenn. Code Ann. § 50-7-303(a)(2)(A). Consequently, the trial court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed**

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Randall W. Burton, Nashville, Tennessee, for the appellant, Kevin C. Redman

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Douglas E. Dimond; Preston Shipp, Assistant Attorneys General, for the appellee, James G. Neeley, Commissioner of the Tennessee Department of Labor and Workforce Development.

Emily Hunter Plotkin, Nashville, Tennessee, for the appellee, Sylvan Park Amoco, Inc.

MEMORANDUM OPINION¹

The issue is whether the trial court correctly dismissed Mr. Redman's challenge to the denial of his unemployment benefits by the Tennessee Department of Labor and Workforce Development ("Agency").

In February of 2004, Kevin Redman filed for unemployment benefits with the Agency. On February 25, 2004, the Agency issued its decision denying benefits on the grounds that Mr. Redman lost his job due to work-related misconduct, *i.e.*, unacceptable attendance. Mr. Redman appealed to the Appeals Tribunal, which affirmed the denial after a hearing in May of 2004.² The Appeals Tribunal found as follows:

FINDINGS OF FACT: Claimant's most recent employment prior to filing this claim was as an auto technician for Sylvan Park Amoco, Inc. from February 2003 until February 6, 2004, when he was discharged. He was rehired by the employer on the agreement that he would report for work on time. He was late for work on sixty-seven occasions and was absent from work on ten occasions. The employer scheduled auto repair work in reliance on the expectation that he would be at work as scheduled. Some business was lost because of the claimant's tardiness and absences. Some, but not most, of his absences were caused by family difficulties or personal illness. He was warned several times, and when he continued to have attendance problems, he was discharged.

CONCLUSIONS OF LAW: The Appeals Tribunal finds that the claimant is not eligible for unemployment benefits. The issue is whether he was discharged for misconduct connected with work under TCA 50-7-303(a)(2). The evidence shows that he was discharged for an intentional violation of a duty to the employer to be at work as scheduled and on time as agreed when rehired. His continuing attendance problems were a willful and wanton violation of a duty that he owed to the employer. The claimant did not remember being absent from work some of the times, but did not deny that he had been absent. Some, but not most, of his absences and tardiness was caused by family difficulties and personal illness. Regarding the sheer number of incidents, his testimony is not as persuasive as that of the employer's testimony,

¹Tenn. R. Ct. App. 10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

²The Appeals Tribunal initially affirmed the Agency's determination for failure of Mr. Redman to appear for the hearing. Upon Mr. Redman's request, however, the Appeals Tribunal set another hearing wherein Mr. Redman and his attorney participated.

in that the vice president testified about the particular dates from the work calendar. Accordingly, the Appeals Tribunal finds that the claimant was discharged for misconduct.

Thereafter, Mr. Redman appealed the denial of benefits to the Board of Review ("Board") on May 24, 2004. One month later, on June 24, 2004, the Board affirmed the decision of the Appeals Tribunal stating that:

FINDINGS OF FACT AND CONCLUSIONS OF LAW: Based upon the entire record in this cause, the Board of Review finds the Appeals Tribunal correctly found the facts and applied the law under T.C.A. § 50-7-303(a)(2). We hereby adopt the findings of fact and decision of the Appeals Tribunal but the same need not be copied herein for the purpose of our decision.

Mr. Redman petitioned the Board for a "rehearing" which was denied as being untimely.

Mr. Redman then petitioned the court for review of the Board's decision in August of 2004 pursuant to Tenn. Code Ann. § 50-7-304. On March 6, 2008, upon cross-motions for summary judgment, the Chancery Court affirmed the denial of benefits. The trial court found that the record contains substantial and material evidence to support the Agency's denial of benefits. This appeal by Mr. Redman ensued.

I. ANALYSIS

Tenn. Code Ann. § 50-7-304(i)(2) - (4) provides that a Chancery Court is to review an Agency decision based on the following standard:

(2) The chancellor may affirm the decision of the board or the chancellor may reverse, remand or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (A) In violation of constitutional or statutory provisions;
- (B) In excess of the statutory authority of the agency;
- (C) Made upon unlawful procedure;
- (D) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (E) Unsupported by evidence that is both substantial and material in the light of the entire record.

(3) In determining the substantiality of evidence, the chancellor shall take into account whatever in the record fairly detracts from its weight, but the chancellor shall not substitute the chancellor's judgment for that of the board of review as to the weight of the evidence on questions of fact. No decision of the board shall be

reversed, remanded, or modified by the chancellor unless for errors which affect the merits of the final decision of the board. The petition for judicial review shall be heard by the chancellor either at term time or vacation as a matter of right, any other statute of this state to the contrary notwithstanding.

(4) It shall not be necessary in any judicial proceedings under this section to enter exceptions to the ruling of the board, but the petition shall distinctly state the grounds upon which the action of the board is deemed erroneous. An appeal may be taken from the judgment and decree of the chancery court having jurisdiction of these controversies to the Tennessee court of appeals, in the same manner, but not inconsistent with the provisions of this chapter, as provided in other civil cases.

Substantial evidence is “such relevant evidence as a reasonable mind might accept to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration.” *Southern Ry. Co. v. State Bd. of Equalization*, 682 S.W.2d 196, 199 (Tenn. 1984) (citations omitted). Courts are admonished not to disturb a “reasonable decision of an agency with expertise, experience and knowledge in the appropriate field.” *Id.* This Court is to apply the same standard as the trial court in reviewing the trial court’s decision in an unemployment compensation case. *Miller v. Tennessee Dept. of Labor and Workforce Development*, 205 S.W.3d 929, 932 (Tenn. Ct. App. 2006); *Armstrong v. Neel*, 275 S.W.2d 953, 955 (Tenn. Ct. App. 1986).

On appeal, Mr. Redman argues that the Agency erred when it found he was disqualified for benefits on the basis that he was terminated for workplace misconduct under Tenn. Code Ann. § 50-7-303(a)(2). According to Mr. Redman, he was not terminated for misconduct. Instead, Mr. Redman maintains that he was required to leave work due to a work related disability under Tenn. Code Ann. § 50-7-303(a)(1) *before* he was terminated.

Tennessee Code Annotated § 50-7-303(a)(1) and (2)(A) provide in pertinent part as follows:

(a) DISQUALIFYING EVENTS. A claimant shall be disqualified for benefits:

(1) If the administrator finds that the claimant has left the claimant’s most recent work voluntarily without good cause connected with the claimant’s work. . . . No disqualification shall be made under this section, however, if the claimant presents evidence supported by competent medical proof that the claimant was forced to leave the claimant’s most recent work because the claimant was sick or disabled and notified the claimant’s employer of that fact as soon as it was reasonably practical to do so, and returned to that employer and offered to work as soon as the claimant was again able to work, and to perform the claimant’s former duties. . . . At the expiration of the period, if the claimant is not reemployed, the claimant shall be entitled to unemployment benefits under this chapter, if otherwise eligible under this chapter . . .;

(2)(A) If the administrator finds that a claimant has been discharged from the claimant's most recent work for misconduct connected with the claimant's work, the disqualification shall be for the duration of the ensuing period of unemployment and until the claimant has secured subsequent employment covered by an unemployment compensation law of this state, another state, or the United States, and was paid wages by the subsequent employment ten (10) times the claimant's weekly benefit amount.

Testimony presented to the Agency by representatives of Sylvan Park Amoco, Inc. show that Mr. Redman had been late sixty-seven (67) times and absent 10 days. The record reflects that Mr. Redman had been warned about the consequences of his attendance problems. Representatives of Sylvan Park Amoco, Inc. testified that he was terminated on February 6, 2004, based upon his attendance problems. The Agency found this termination for misconduct disqualified Mr. Redman from receiving unemployment benefits under Tenn. Code Ann. § 50-70-303(a)(2). There is no dispute among the parties that excessive absenteeism can constitute misconduct warranting denial of unemployment benefits under Tenn. Code Ann. § 50-70-303(a)(2). *Wallace v. Stewart*, 559 S.W.2d 647, 648 (Tenn. 1977).

Mr. Redman argues that since he injured his back while at work on February 2 and 4, 2004, then Tenn. Code Ann. § 50-70-303(a)(1) applies since he left work because he was sick or disabled. The Agency heard testimony from the involved parties and determined that Mr. Redman was terminated for attendance problems under Tenn. Code Ann. § 50-7-303(a)(2) and was not forced to leave work because he was sick or disabled under Tenn. Code Ann. § 50-7-303(a)(1). Given the standard of review we are required to apply, we agree with the trial court that there is substantial and material evidence to support the Agency's conclusion.

The trial court is affirmed. Costs of appeal are assessed against Kevin C. Redman for which execution may issue if necessary.

PATRICIA J. COTTRELL, P.J., M.S.